MOTION FILED

FEB - 4 1993

No. 93-1173

IN THE

Supreme Court of the United States

October Term, 1993

BALTIMORE CITY LODGE NUMBER 3,
FRATERNAL ORDER OF POLICE,
Petitioners,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,
Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE FRATERNAL ORDER OF POLICE, GRAND LODGE, AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI FILED BY THE BALTIMORE CITY LODGE NUMBER 3

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

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The Fraternal Order of Police, Grand Lodge, respectfully moves this Court for leave to file the accompanying brief in this case as *amicus curiae*. The consent of the attorney for the petitioner herein has been requested and obtained, but the attorney for the respondent, upon request, refused to consent to the filing of the attached brief *amicus curiae*.

The applicant, the Fraternal Order of Police, Grand Lodge, has a vital interest in this case. As the national representative of the local lodges, including Baltimore City Lodge Number 3, the Grand Lodge is able to present to this Court the national significance of the issues presented in the petition. The attached brief contains a discussion regarding why this Court should grant the petition for a writ of certiorari, and this discussion presents additional arguments that were not made by the petitioner, and which this Court should consider when deciding whether to grant the petition.

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

THE INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT:

I. The Fourth Circuit's decision calls into question the sanctity of contracts entered into by a state and dilutes the protection conferred by the Contract Clause 7

II. The Fourth Circuit's decision ignores and misinterprets this Court's language regarding the level of scrutiny a court should apply when examining a state's impairment of a public contract 10

III. The Fourth Circuit relied upon an improper ground in deciding that the city of Baltimore's furlough plan is constitutional 13

IV. The Fourth Circuit's decision enables states to impair their contracts when budget cuts arise, and to impose the burden of fiscal shortfalls upon a group of individuals lacking political power 15

CONCLUSION 18

TABLE OF AUTHORITIES

PAGE

CASES

Allied Structural Steel Co. v. Spannaus,
438 U.S. 234 (1978) 3, 7, 16

Association of Surrogates v. State of New York,
940 F.2d 766 (2d Cir. 1991), *cert. denied*,
112 S. Ct. 936 (1992) 4, 16, 17

Baltimore Teachers Union v. Mayor and City Council of Baltimore, 6 F.3d 1012
(4th Cir. 1993) 12, 15

Carlstrom v. State, 694 P.2d 1 (Wash. 1985) 5

Condell v. Bress, 983 F.2d 415 (2d Cir.),
cert. denied, 113 S. Ct. 1849 (1993) 4

City of El Paso v. Simmons, 379 U.S. 497 (1965) 12

Energy Reserves Group, Inc. v. Kansas Power & Light Co.,
459 U.S. 400 (1983) 3, 10, 11, 14, 15

Home Building & Loan Ass'n v. Blaisdell,
290 U.S. 398 (1934) 7

Keystone Bituminous Coal Ass'n v. DeBenedictis,
480 U.S. 470 (1987) 11

Murray v. Charleston, 96 U.S. 432 (1877) 7

Opinion of the Justices,
609 A.2d 1204 (N.H. 1992) 4

TABLE OF AUTHORITIES (cont.)

PAGE

CASES

State of Nevada Employees Ass'n, Inc. v. Keating, 903 F.2d 1223 (9th Cir.), *cert. denied*, 498 U.S. 999 (1990) 4

United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) 3, 7, 10, 11, 12, 13, 16

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 10, cl. 1 ..... *passim*

MISCELLANEOUS

Bureau of Justice Statistics, U.S. Dep't of Justice, No. NCJ-134436, *Law Enforcement Management and Administrative Statistics, 1990: Data for Individual State and Local Agencies with 100 or More Officers* (1992) 1

Harold W. Davey, et al., *Contemporary Collective Bargaining* (4th ed. 1982) 9

Richard C. Kearney, *Labor Relations in the Public Sector* (1984) 9

Charles S. Loughran, *Negotiating a Labor Contract [,] A Management Handbook* (1992) 4

Note, *A Process-Oriented Approach to the Contract Clause*, 89 Yale L.J. 1623 (1980) 8, 9, 15

Laurence H. Tribe, *American Constitutional Law* (1978) 8

THE INTEREST OF AMICUS CURIAE

The Fraternal Order of Police, Grand Lodge ("FOP"), is a national fraternal organization of state and subordinate lodges consisting of law enforcement officers of the United States and of the states and their political subdivisions. Comprised of more than 240,000 members, the FOP is the largest member organization of law enforcement officers in the United States, or, to our knowledge, in the world. The FOP currently has 1,989 lodges in 35 states. The membership of each local lodge typically includes officers from several law enforcement jurisdictions. Many local lodges also serve as the collective bargaining representative for lodge members.

The FOP has a vital interest in the issues raised in the Baltimore City Lodge Number 3's petition for a writ of certiorari because law enforcement officers across the country regularly are parties to collective bargaining agreements. Many police and other law enforcement officers in the United States negotiate and enter into agreements with their employer regarding wages and other terms and conditions of employment.[1]

The decision of the Fourth Circuit will likely have a dramatic impact upon the administration of wage agreements entered into by state employers and law enforcement agencies, because, in this case, a federal court has permitted an employer

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[1] According to the results of the 1990 Law Enforcement Management and Administrative Statistics (LEMAS) survey questionnaire mailed to 780 state and local law enforcement agencies employing 100 or more sworn officers, 56% of county police agencies, 72% of municipal police agencies, 47% of sheriff agencies, 82% of special police agencies, and 49% of state police agencies authorize collective bargaining by employees. Bureau of Justice Statistics, U.S. Dep't of Justice, No. NCJ-134436, *Law Enforcement Management and Administrative Statistics, 1990: Data for Individual State and Local Agencies with 100 or More Officers* Table C (1992).

unilaterally to modify a wage agreement.[2] A law enforcement officer who is subject to a wage agreement will now face the uncertainty of whether his or her wages may be reduced by the public employer, without their agreement, when the employer decides that the money used to fund law enforcement salaries should be spent elsewhere.

Moreover, the decision of the Fourth Circuit will directly impact the negotiations process that takes place between law enforcement officers and their respective public employers. If an employer is unwilling to meet the employees' compensation demands, the employer now, following the Fourth Circuit's decision, may enter into a wage agreement, knowing that it will be able to unilaterally modify the agreement at a later date. This represents a dramatic change in the manner in which labor agreements traditionally have been negotiated and administered in this country.

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[2] While the case at issue involves the decision of the City of Baltimore to impair its contract, for purposes of clarity and consistency, this brief refers to the city's impairment as a state impairment.

SUMMARY OF ARGUMENT

The petition for a writ of certiorari filed by Baltimore City Lodge Number 3 presents an important question that this Court needs to resolve: What level of deference is due a state's decision to unilaterally modify a contract to which it is a party, under the Contract Clause of the United States Constitution.[3]

This Court previously has addressed the situation in which a state, as a party to a contract, unilaterally modifies a term of its agreement.[4] In decisions subsequent to *United States Trust*, this Court again has emphasized the value that society places upon contracts and their enforceability, and has recognized that a reviewing court must more closely scrutinize state impairments of a contract when the state itself is a party to the contract. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978); *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412 n.4 (1983).

While the lower courts have recognized this Court's general pronouncement that deference to legislative discretion is less appropriate when the state is a party to the agreement that has been impaired, these courts nonetheless have issued opinions that conflict with respect to the degree of deference that is due. This Court needs to clarify its language in *United States Trust*, and resolve a conflict among the state and circuit courts.

The decision of the Fourth Circuit is in conflict with this Court's language in *United States Trust*, and with the decisions of several federal circuit courts which have struck down state contractual impairments as unconstitutional under the Contract

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[3] The Contract Clause provides: "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const., art. I, § 10, cl. 1.

[4] *See United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977).

Clause. *See, e.g., Condell v. Bress*, 983 F.2d 415 (2d Cir.), *cert. denied*, 113 S. Ct. 1849 (1993); *Association of Surrogates v. State of New York*, 940 F.2d 766 (2d Cir. 1991) (holding New York's lag-payroll plan, whereby state employees' earnings were deferred, in order to fund expansion of judiciary to combat state's drug crisis, unconstitutional under Contract Clause), *cert. denied*, 112 S. Ct. 936 (1992); *State of Nevada Employees Ass'n, Inc. v. Keating*, 903 F.2d 1223 (9th Cir.), *cert. denied*, 498 U.S. 999 (1990).[5]

By deferring to the state's legislative discretion to such a large degree, the Fourth Circuit effectively insulates from review a state's decision to alter an important term of an agreement to which it is a party.[6] After the Fourth Circuit's decision, a state need only assert that it is in the midst of a "budget crisis" or "fiscal emergency," and it will be permitted to escape from a contract term that it was not able to change during its negotiations.

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[5] The Fourth Circuit's decision also is in conflict with a number of state court decisions, including one decision which held a very similar furlough program unconstitutional. *Opinion of the Justices*, 609 A.2d 1204, 1211 (N.H. 1992) (holding that state bill requiring state employees receiving a salary in excess of $15,000 to take unpaid days of leave violates Contract Clause despite legislature's assertion of fiscal necessity, because the state had several available alternatives, including reducing services and raising taxes).

[6] *See Opinion of the Justices*, 609 A.2d at 1210 ("[t]he bill [imposing mandatory unpaid leave] . . . impairs the very heart of an employment contract: the promise of certain work for certain income."). *See also* Charles S. Loughran, *Negotiating a Labor Contract[,] A Management Handbook* at 291 (1992) ("[t]he meat and potatoes of any labor contract negotiations is the 'money package.' Probably 90 percent of labor negotiations succeed or fail on the basis of the parties' ability, or lack thereof, to reach agreement on the monetary aspects of their negotiation").

Contrary to the language in this Court's opinions, and in the opinions of other circuits to consider the question, the Fourth Circuit has enabled a state to avoid the politically unpopular course when budget cuts inevitably arise, and impose the burden upon a limited group of individuals whose political voice is relatively small. If the courts are not required to give a state's justification of its breach of contract more exacting scrutiny than that undertaken by the Fourth Circuit, any state with budget shortfalls may unilaterally alter its wage agreements with its employees, and face little challenge either from the courts or from the political process.

This case is of enormous importance to all law enforcement officers in the United States who bargain with their employers for wages and other terms and conditions of employment. The decision of the Fourth Circuit permits a state employer who unsuccessfully bargains for a mutually agreeable wage merely to agree upon a certain wage, exact concessions from labor in exchange for the agreed upon wage, and then unilaterally change the terms of the bargain.[7]

The FOP recognizes that many states face budget cuts.[8] However, the Fourth Circuit's decision effectively gives states free license to alter its agreements for the sake of political expediency. The FOP urges this Court to hold that a state that negotiates and reaches an agreement as to the wages it will pay

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[7] Quite often, contracts are entered into because of legislatively-mandated alternative dispute resolution. The Fourth Circuit's decision could permit a city to circumvent such binding arbitration.

[8] It is important to note that many states for years have encountered budget problems, but courts did not permit them to escape their financial obligations. *See, e.g., Carlstrom v. State*, 694 P.2d 1, 5 (Wash. 1985) ("[f]inancial necessity, though superficially compelling, has never been sufficient of itself to permit states to abrogate contracts").

its law enforcement officers and then violates its agreement must undergo exacting scrutiny before such action will be sustained under the Contract Clause.

ARGUMENT

I. The Fourth Circuit's decision calls into question the sanctity of contracts entered into by a state and dilutes the protection conferred by the Contract Clause.

In *United States Trust*, this Court stated that "the general purpose of the [Contract] Clause was clear: to encourage trade and credit by promoting confidence in the stability of contractual obligations." *United States Trust*, 431 U.S. at 15 (citing *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 427-28 (1934)). This Court, in holding that a state could not escape its financial obligations under a covenant to which it was a party, discussed the binding nature of contractual obligations:

> "[t]he truth is, States and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons. Hence, instead of there being in the undertaking of a State or city to pay, a reservation of a sovereign right to withhold payment, the contract should be regarded as an assurance that such a right will not be exercised. A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity."

Id. at 25 n.23 (quoting *Murray v. Charleston*, 96 U.S. 432, 445 (1877)).[9]

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[9] *See also Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978) ("[t]he severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them").

In his discussion of the Contract Clause, Laurence Tribe writes that when a state indicates that it is trustworthy and may be held to its word, thereby inducing others to contract with it, "a powerful argument may be advanced that the most basic purposes of the impairment clause, as well as notions of fairness that transcend the clause itself, point to a simple constitutional principle: *government must keep its word.*" Laurence H. Tribe, *American Constitutional Law* § 9-7 at 470 (1978).

Similarly, another author concludes that, under the Contract Clause, a state must not take its contractual obligations lightly:

> [i]n a public-contract case, a court should presume that impairment of the contract upset[s] legitimate expectations. In entering into the contract, the state negotiated its terms and committed itself expressly to honoring the contract. As a consequence of this express commitment, other parties are strongly justified in relying upon enforcement of the contract. The stricture against the

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Interpreting this Court's language, one author writes:

> [a] central concern of the Supreme Court in contract clause cases has been to protect legitimate contract-based expectations from government interference. That concern has rested on two principles: that a state is estopped from dishonoring its commitment that a contractual obligation recognized by it will remain secure; and that there is a legitimate expectation that a private arrangement will not be disturbed without special justification. The first principle protects justified reliance upon state assurances of security; the second principle protects the individual autonomy and independence that the institution of contract is designed, in part, to foster. A state's impairment of a contract can both disturb reliance upon a commitment of security and upset expectations of government noninterference.

Note, *A Process-Oriented Approach to the Contract Clause*, 89 Yale L.J. 1623, 1627-28 (1980) (footnotes omitted).

> state's breaking its word therefore applies with great force. Impairment defeats a justified reliance interest, and courts should therefore require a legislature to address explicitly its failure to keep its word.

Note, *A Process-Oriented Approach to the Contract Clause*, 89 Yale L.J. 1623, 1647 (1980).[10]

In this case, the city of Baltimore, with knowledge of current and impending budget cuts, utilized the collective bargaining process to arrive at a certain wage to be paid to the Baltimore police officers. The agreement later was ratified by the Board of Estimates, and ultimately was incorporated into the Ordinance of Estimates, which the Baltimore City Council enacted into law. The city's decision to abrogate its contract with the Baltimore police should be carefully scrutinized, given both the Constitution's prohibition against the impairment of contract, and the clear policy that supports the value of contract stability in society as a whole.

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[10] *See also* Harold W. Davey, et al., *Contemporary Collective Bargaining* at 2 (4th ed. 1982) ("[w]hen employer and union negotiate a contract, they are reaching a joint understanding on a written statement of policies and procedures under which they must live together. . . . It is the process of *living together under the agreement* that gives meaning and significance to the written instrument"); Richard C. Kearney, *Labor Relations in the Public Sector* at 281, 282 (1984) ("[t]he negotiated contract serves as the legal basis of the continuing relationship between union and management," and "[t]he collective bargaining agreement in the United States is traditionally referred to as a 'contract' much in the sense of a commercial contract. Like the commercial contract, the collective bargaining agreement is enforceable in the courts") (footnote omitted).

II. The Fourth Circuit's decision ignores and misinterprets this Court's language regarding the level of scrutiny a court should apply when examining a state's impairment of a public contract.

In *United States Trust*, this Court stated an overall standard of review applicable to both public and private contracts: "an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose." *United States Trust*, 431 U.S. at 25. However, this Court also stated:

> complete deference to a legislative assessment of reasonableness and necessity is not appropriate [when] the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.

Id. at 26.[11]

Similarly, in *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412 n.14 (1983), this Court held that "[w]hen a State itself enters into a contract, it cannot simply walk away from its financial obligations." Moreover, this Court also stated that "[i]n almost every case, the Court had held a

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[11] As the Baltimore City Lodge noted in its petition, it is not clear that the city's decision to impose the furlough plan constitutes a legislative decision. This presents an additional reason why this Court should grant the petition, and resolve the question regarding what level of deference is due a legislature's decision to impair its contract, as well as what level of deference is due a non-legislative impairment. Assuming that the city's decision to implement the furlough plan is a legislative decision, the Fourth Circuit nonetheless misapplied the controlling precedent.

governmental unit to its contractual obligations when it enters financial or other markets." *Id.*[12]

An examination of how this Court resolved the Contract Clause challenge in *United States Trust* reveals the error in the Fourth Circuit's decision. In *United States Trust*, New York and New Jersey entered into a statutory covenant that limited the Port Authority's ability to subsidize rail passenger transportation with revenues and reserves that had been pledged as security for certain bonds issued by the Port Authority. Two years later, both states retroactively repealed the covenant. The trustee and holder of Port Authority bonds brought suit, alleging that New Jersey's repeal of the statute violated the Contract Clause. This Court agreed.

The state asserted its reasons for the repeal as wanting to promote "[m]ass transportation, energy conservation, and environmental protection." *United States Trust*, 431 U.S. at 28. While this Court recognized these goals as "important" and "of legitimate public concern," this Court also cautioned that "a State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors." *Id.* at 28, 29.

In conducting its necessity and reasonableness inquiry, this Court stated: "a State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives. Similarly, a State is not free to impose a drastic

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[12] *See also Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 505 (1987) ("But, we have repeatedly held that unless the State is itself a contracting party, courts should 'properly defer to legislative judgment as to the necessity and reasonableness of a particular measure'") (quoting *Energy Reserves*, 459 U.S. at 413).

impairment when an evident and more moderate course would serve its purposes equally well." *Id.* at 30-31.

This Court examined a number of alternatives available to the state of New Jersey in deciding whether the impairment was necessary.[13] With respect to the reasonableness of the state's impairment, this Court again reviewed its decision in *El Paso*, noting that in that case the repeal of a nineteenth century statute was reasonable because it "had effects that were unforeseen and unintended by the legislature when originally adopted." *United States Trust*, 431 U.S. at 31. In *United States Trust*, however, this Court found that the state could have foreseen any change in the circumstances that led it to repeal the covenant, and therefore the impairment was unreasonable.

The Fourth Circuit's decision is in conflict with this Court's decision in *United States Trust* for a number of reasons. First, the Fourth Circuit did not require the city of Baltimore to show that its decision to furlough its employees was necessary and reasonable. The court expressly refused to consider the alternatives available to the city because it did not consider it to be an appropriate subject for judicial inquiry. *See Baltimore Teachers Union v. Mayor and City Council of Baltimore*, 6 F.3d 1012, 1021-22 (4th Cir. 1993) ("[t]he Contract Clause, however, does not require the courts — even where public contracts have been impaired — to sit as superlegislatures, determining, for example, whether it would have been more appropriate instead for Baltimore to close its schools for a week, an option actually considered but rejected, or to reduce funding to the arts . . .").

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[13] This Court also considered its previous decision in *City of El Paso v. Simmons*, 379 U.S. 497, 515-16 (1965), where this Court found the state's impairment "quite clearly necessary." This Court then held that New Jersey failed to show that New Jersey's contractual impairment was "similarly necessary." *United States Trust*, 431 U.S. at 31.

The Fourth Circuit also noted only that "*some* degree of deference is appropriate" when a state impairs a contract to which it is a party, meaning that "the legislature's asserted justifications for the impairment shall not be given the complete deference that they otherwise would enjoy." *Id.* at 1019 n.10.

Clearly, the Fourth Circuit did not apply the heightened level of scrutiny called for by this Court in *United States Trust.* Not only did it fail to require the city of Baltimore to show that its impairment was necessary, it also failed to properly apply the "reasonableness" component of the analysis. The lower court proceedings indicate that the city was aware of impending budget cuts at the time it entered into its agreement with the law enforcement officers. *See id.* at 1021 n.13. Consequently, under *United States Trust*, the circumstances that caused the city to impair its contract were foreseeable. The Fourth Circuit misapplied this Court's decision in *United States Trust*, and this Court should grant the petition for a writ of certiorari in order to correct the Fourth Circuit's interpretation of the Contract Clause, and prevent any further division among the federal and state courts on this issue.

III. The Fourth Circuit relied upon an improper ground in deciding that the city of Baltimore's furlough plan is constitutional.

In its opinion, the Fourth Circuit compared the city's furlough plan to the situation in which state legislation affects private contracts in a heavily regulated industry. According to the court:

> [p]ublic employees — federal or state — by definition serve the public and their expectations are necessarily defined, at least in part, by the public interest. It should not be wholly unexpected, therefore, that these public

> servants might well be called upon to sacrifice first when the public interest demands sacrifice.

Id. at 1021.

The court relied upon this Court's decisions in *Energy Reserves* and *Spannaus* to support its conclusion. In *Energy Reserves*, a state public utility and an oil company contracted for the purchase of gas by the utility at a certain price. *Energy Reserves*, 459 U.S. at 403. The state government enacted a price control statute that in effect increased the price to be paid under the contract. This court rejected a Contract Clause challenge to the price control statute. First, this Court noted that the *United States Trust* standard did not apply because the state did not alter its own obligations. *Id.* at 412-13 n.14. Second, in deciding whether the impairment was substantial, this Court held that price regulation was foreseeable by the parties due to the extensive government regulation of gas prices. *Id.* at 416.

The Fourth Circuit's reasoning clearly is inapposite in this case. The language the Fourth Circuit refers to in *Energy Reserves* addresses whether the contractual impairment was substantial. Moreover, while public employment may be subject to a number of regulations, public employees certainly cannot be said to anticipate wage decreases in violation of their collective bargaining agreements. The Fourth Circuit's logic is unsupported by the language in this Court's decisions, and was an improper ground upon which to reject petitioner's Contract Clause claim.

IV. The Fourth Circuit's decision enables states to impair their contracts when budget cuts arise, and to impose the burden of fiscal shortfalls upon a group of individuals lacking political power.

This is a case of a city choosing to breach a wage agreement with its own employees because the alternatives to the breach were perceived by city officials as being politically unpopular. Apparently the city considered cutting funding to the arts rather than imposing the furlough plan upon city employees, but a letter writing campaign caused the city to abandon this alternative. *See* Appellee FOP's Brief to the Fourth Circuit at 13. The city also considered closing its schools for a week, but again the city concluded that this would not be a politically wise alternative. *Baltimore Teachers Union*, 6 F.3d at 1022; Appellants' Reply Brief to the Fourth Circuit at 13.

When a state chooses to impair a contract to which it is a party because its alternatives are politically unpopular, it is precisely the time when a reviewing court must closely scrutinize the impairment.[14] *See* Note, *A Process-Oriented Approach to the Contract Clause*, 89 Yale L.J. 1623, 1638 (1980) ("[d]eference to legislatures rests on the assumption that policy determinations and factual judgments must be trusted when the process that generates them is functioning properly"). A state, acting in its own self interest, that considers and rejects certain alternatives because of the political consequences of implementing them, clearly has failed to show the necessity and reasonableness of the impairment. Contrary to the Fourth Circuit's decision, essentially no deference is due a state's decision to walk away from its contractual obligations in order

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[14] It is particularly necessary to carefully review the city's decision when the impairment is not implemented via the customary political channels.

to avoid the political consequences that accompany its other options.

This Court has indicated a willingness to scrutinize a state's contractual impairment when the state's self interest is involved. *See United States Trust*, 431 U.S. at 26 ("complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake"); *Spannaus*, 234 U.S. at 241 (Contract Clause was "perhaps the strongest single constitutional check on state legislation").

The Second Circuit recently recognized the need for courts to carefully scrutinize a state's decision to renege on its financial promises because such decisions often are politically motivated. In *Association of Surrogates v. State of New York*, 940 F.2d 766, 773 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 936 (1992), the Second Circuit struck down the state's lag-payroll plan because it did not satisfy the "necessary" component of the *United States Trust* test. The court found that two viable alternatives existed to impairing its employment agreements, including shifting funds from another government program, or raising taxes. *Id.* at 773. The court stated:

> [w]e recognize that neither alternative would have been popular among politician-legislators, but that is precisely the reason that the contract clause exists — as a "constitutional check on state legislation".

Id. (quoting *Spannaus*, 438 U.S. at 241).

The court continued, stating:

> [c]learly, the New York legislators and its governor would prefer not to raise the taxes of their constituents; by placing the costs of improvements to the court system on the few shoulders of judiciary employees instead of

> the many shoulders of the citizens of the state, they ruffle only a few feathers and fight the "exploding drug crisis" without raising taxes or cutting other governmental programs. But the only people paying for the new courts are the few employees of the judicial branch who are subjected to the lag payroll. The contract clause bars such expedient *post hoc* changes in contractual obligations. . . .

Id.

Finally, the court noted:

> [w]ere we to uphold this lag-payroll legislation, one wonders if the employees would ever receive their lagged wages, or whether another of the state's perennial "fiscal crises", would justify deferring again, or even cancelling, the lagged wages when they eventually become due. If a state government could so cavalierly disregard the obligations of its own contracts, of what value would its promises ever be?

Id. at 774 (citation omitted).

By permitting the city of Baltimore to walk away from its financial commitment to its own employees, the Fourth Circuit has opened the door to claims by states across the country that they cannot afford to meet their obligations. If the Fourth Circuit's deferential standard of review is applied, these claims essentially will be unreviewable by the courts. Contract impairment by states will become the rule, rather than the exception.

CONCLUSION

This Court should grant the petition for a writ of certiorari filed by the Baltimore City Lodge Number 3, and reverse the decision of the Fourth Circuit.

Respectfully submitted,

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